

AUG 06 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

ALFONSO PASCUAL-GARCIA,

Petitioner,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

No. 02-71844

Agency No. A29-277-910

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted July 16, 2003
Pasadena, California

Before: NOONAN, KLEINFELD, and WARDLAW, Circuit Judges.

Alfonso Pascual-Garcia petitions for review of the Board of Immigration Appeals' decision denying his requests for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). We have jurisdiction pursuant to 8 U.S.C. § 1252(b) and we grant the petition.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

This is a mixed motive case. Although the BIA is correct that Pascual-Garcia, an indigenous Mayan native of rural Guatemala, may have been persecuted because he witnessed his father's murder, it disregarded compelling evidence that Pascual-Garcia was also persecuted on the basis of an imputed political opinion. *See Sangha v. INS*, 103 F.3d 1482, 1489–90 (9th Cir. 1997) (imputed political opinion provides basis for asylum relief). To establish eligibility for asylum, Pascual-Garcia needed to show only that he was persecuted, in part, on a statutory ground. *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1068 (9th Cir. 2003); *Garcia-Ramos v. INS*, 775 F.2d 1380 (9th Cir. 1985).

Neither the IJ nor the BIA questioned Pascual-Garcia's credibility. Pascual-Garcia's father was a long-time member and prominent leader of the Civil Patrols, a government unit, with a history of confrontations with the guerillas, including specifically Reyes. Pascual-Garcia testified that his father's murderer, whom Pascual-Garcia recognized as a neighbor and guerilla leader named Reyes, threatened to kill him if he either "turned him over or . . . told anybody that he was a guerilla." When Reyes learned that he was wanted by Guatemalan soldiers, he believed it was Pascual-Garcia who had informed upon him (even though this was in fact not true). Reyes began looking for the boy, causing him to flee the country. This evidence shows Reyes believed Pascual-Garcia was aligned with the

government and anti-guerilla (because if he were anti-government -- unlike his father -- he would not have informed), and pursued Pascual-Garcia on that basis.

A rebuttable presumption of a well-founded fear of future persecution arises upon a finding of past persecution. *See, e.g., Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003); *Ruano v. Ashcroft*, 301 F.3d 1155, 1159 (9th Cir. 2002). Because substantial evidence compels a finding of past persecution on the basis of imputed political opinion, we must remand to give the government an opportunity to rebut this presumption. *See Ventura v. INS*, 317 F.3d 1003, 1005 (9th Cir. 2003).

Because the BIA denied Pascual-Garcia's claim for withholding of deportation solely on the ground that he did not satisfy the lower threshold for asylum relief, we must remand Pascual-Garcia's withholding claim for further proceedings.

The BIA applied an incorrect legal standard in determining that Pascual-Garcia failed to state a prima facie case for relief under the CAT because he failed to establish that he would be tortured "by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim." A CAT claim does not require that the torture would occur while the victim is in the custody or physical control of a public official. *See Li Chen Zheng*

v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003) (remanding CAT claim where petitioner feared retaliation from “snakeheads,” i.e., “human smugglers” of Chinese immigrants). We therefore must remand this claim as well.

We lack jurisdiction to grant Pascual-Garcia’s request for voluntary departure. *See* 8 U.S.C. § 1229c.

PETITION GRANTED, ORDER VACATED, and REMANDED.